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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ROBERTO GARDEA,

Defendant and Appellant.

F071200

(Kern Super. Ct. No. BF155640A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Meredith Fahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and Smith, J.

## **INTRODUCTION**

Appellant Jesus Roberto Gardea was convicted by a jury of one count of assault by means of force likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(4)<sup>1</sup> and one count of misdemeanor battery, a violation of section 243, subdivision (a). In a court trial, it was found true that Gardea had suffered a prior strike conviction within the meaning of section 667, subdivisions (c) through (j), and served three prior terms of imprisonment within the meaning of section 667.5, subdivision (b).

Gardea contends the evidence is insufficient to sustain the section 245, subdivision (a)(4) conviction. He also contends that his prior strike conviction subsequently was reduced to a misdemeanor and therefore, can no longer be used to enhance his sentence. We disagree with Gardea's contentions and affirm.

## **FACTUAL AND PROCEDURAL SUMMARY**

Our factual and procedural summary is limited to those matters necessary to a determination of the issues raised in this appeal.

On June 16, 2014, around 11:00 p.m., Kern County Deputy Sheriff Julia Castaneda was on duty at the Kern County Jail. Castaneda was supervising inmates at the receiving area. Another deputy was monitoring the receiving area cells by video surveillance. The deputy monitoring the video cameras radioed the other deputies that two inmates in holding cell four were fighting.

Deputy Castaneda and other deputies responded by going to cell four. Castaneda entered the cell, saw that an inmate had a "bloody nose," and "immediately grabbed him." The deputy monitoring the video radioed that the other inmate in the fight had "long hair" and a "white tank top." Castaneda ordered the inmate out of the cell and handcuffed him. Castaneda identified Gardea as the other inmate involved in the fight.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

The inmate with the bloody nose, William Savely, was escorted to the nurse's station by Deputy Castaneda. Castaneda observed that Savely had bruising and swelling under his left eye and a bloody nose. Savely did not "want to talk about what happened." The only injuries to Savely were to his head.

Gardea was interviewed by a deputy and initially claimed he could not remember what occurred because he "blacked out." Gardea subsequently stated Savely was saying "stupid, nasty things."

Gardea was charged with assault by means of force likely to produce great bodily injury, with the allegation that it was committed for the benefit of a criminal street gang, and battery committed for the benefit of a criminal street gang. Several enhancements were alleged, including that Gardea had previously been convicted of a serious felony (§ 667, subd. (a)); had a prior strike conviction (§ 667, subds. (c)–(j)); and had served three prior prison terms (§ 667.5, subd. (b)).

The surveillance video from the jail was played for the jury. In the video, Savely is shown sitting on a bench in the holding cell; a concrete wall is behind Savely. Other inmates are in the holding cell. Gardea walks over to Savely, who is seated, and punches Savely multiple times in the head. Savely attempts to protect himself from the punches by trying to wrap his arms around his head.

Gardea testified and claimed that when he punched Savely, he did not want to hurt him "real bad." Gardea admitted punching Savely five to six times with closed fists, using both fists. He also admitted that he "threw pretty hard punches."

On December 15, 2014, the jury returned its verdicts finding Gardea guilty of violating section 245, subdivision (a)(4) and misdemeanor battery in violation of section 243, subdivision (a). The gang allegation was found not true. In a court trial on December 16, 2014, the section 667, subdivision (a) allegation was dismissed, and the trial court found the prior felony and prior prison allegations true.

Gardea appealed. Subsequently, on February 8, 2016, Gardea filed a request for judicial notice, seeking judicial notice of the petition he filed pursuant to section 1170.18, subdivision (f) to reduce his prior felony conviction to a misdemeanor. On March 4, 2016, this court deferred ruling on the request for judicial notice pending consideration of the appeal on its merits.

On March 17, 2016, Gardea filed a second request for judicial notice seeking to have the order reducing his prior felony conviction to a misdemeanor judicially noticed. By order dated March 25, 2016, this court deferred ruling on the second request for judicial notice. A request to file supplemental briefing was granted.

### **DISCUSSION**

Gardea contends the evidence is insufficient to support the section 245, subdivision (a)(4) conviction because he did not use “force likely to produce great bodily injury.” In his supplemental briefing, he asserts that the prior strike enhancement must be stricken because his prior felony has been reduced to a misdemeanor. We disagree.

#### **I. Sufficiency of the Evidence**

##### ***Standard of Review***

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, 26 Cal.3d at p. 578.) An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses,

or resolve factual conflicts, as these are functions reserved for the trier of fact. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.)

### ***Analysis***

Here, the jury reasonably concluded that Gardea assaulted Savely with force likely to produce great bodily injury. Section 245, subdivision (a)(4) states:

“Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.”

The kind of force likely to produce serious bodily injury under section 245 is a question of fact for the jury. (*People v. Colbert* (1970) 6 Cal.App.3d 79, 84.) Like other assaults, section 245 focuses on the likelihood, not the actual production of, injury. (*People v. Roberts* (1981) 114 Cal.App.3d 960, 964; *People v. Parrish* (1985) 170 Cal.App.3d 336, 343.)

Gardea emphasizes that he hit Savely with “six short punches” that he claims were not likely to cause great bodily injury, and Savely did not sustain any long-term injuries. The issue presented, however, is not whether Savely’s injuries constituted “great bodily injury,” but whether the force Gardea employed was sufficiently likely to cause serious bodily injury. While the extent of injuries inflicted are relevant and often controlling factors regarding whether the force used was of a felonious character, they are not determinative. (*People v. Roberts, supra*, 114 Cal.App.3d at p. 964; see also *People v. Wells* (1971) 14 Cal.App.3d 348, 358.)

Here, Gardea punched Savely multiple times with closed fists, in rapid succession, and targeted the blows to Savely’s head. Savely had injuries to the eye area and a bloody nose, and while these injuries may not constitute great bodily injury, the “gravamen of the offense is the likelihood that great bodily injury will result from the force applied, not that injury actually occurred. [Citations.]” (*People v. Chambers* (1964) 231 Cal.App.2d

23, 27.) Given the nature of the blows, the number of blows, the targeting of the head, and Gardea's admission that he "threw pretty hard blows," a reasonable jury could find that Gardea attacked Savely with force likely to produce great bodily injury, even if great bodily injury did not occur.

Substantial evidence supports the jury's verdict on the section 245, subdivision (a)(4) offense.

## **II. Prior Felony Reduction to Misdemeanor**

Gardea contends that the subsequent reduction of his prior felony to a misdemeanor pursuant to section 1170.18 requires that one of the 667.5, subdivision (b), prior prison term enhancements be stricken, as the offense is no longer a felony. He is mistaken.

In supplemental briefing, Gardea asserts that he has filed a petition to reduce his prior felony to a misdemeanor, pursuant to Proposition 47 (the Safe Neighborhoods and Schools Act or the Act), and that the petition was granted. In his requests for judicial notice filed with this court, however, he failed to present a final order, instead providing the minute order, and no certified copy of the order was provided. Consequently, we deny Gardea's requests for judicial notice. (Cal. Rules of Court, rule 8.252, subd. (c)(3).)

Regardless, for purposes of analysis, we will assume Gardea's prior felony has been reduced to a misdemeanor pursuant to section 1170.18.

Gardea previously was convicted of a violation of Health & Safety Code section 11377, subdivision (a), as a felony in December 2009. In December 2014, approximately one month after the passage of Proposition 47, Gardea was sentenced in the instant case. His prior felony conviction was used to enhance his current sentence as a prior prison term (§ 667.5, subd. (b)). In February 2016, the trial court apparently granted Gardea's petition to reduce his prior felony conviction to a misdemeanor under Proposition 47 (§ 1170.18). Gardea contends the prior prison term enhancement based on this conviction must be stricken as a result.

Neither Proposition 47 nor the Act's ballot materials address section 667.5 or recidivist enhancements generally; the materials indicate voters were assured that if the initiative was passed, dangerous criminals would remain locked up and there would be no automatic release of criminals. (Voter Information Guide, Gen. Elec., Nov. 4, 2014, text of Prop. 47, § 3, subds. (4), (5), p. 70); *id.*, rebuttal to argument against Prop. 47, p. 39.) Section 667.5 is a recidivist enhancement, intended to punish hardened criminals who are undeterred by the fear of prison. (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) Because a person who refuses to reform even after serving time in prison is clearly more dangerous than someone who merely possesses drugs for personal use or shoplifts, we are not persuaded the voters intended Proposition 47 to necessarily alter prior prison term enhancements.

Gardea also argues Proposition 47 clearly envisioned retroactive relief for those who qualified. He cites to subdivisions (f) and (g) of section 1170.18. Subdivision (f) permits an inmate currently serving a sentence for a Proposition 47 reducible felony to petition the superior court for recall of his or her sentence. (§ 1170.18, subd. (f).) Subdivision (g) states: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).) However, nothing within the plain language of these subdivisions nor the statutory scheme of which they are a part indicates a prior prison term enhancement may be stricken because a felony conviction subsequently is reduced by the Act.

Furthermore, according to Gardea, because a prior offense is reduced to a misdemeanor under the Act "for all purposes," a prior prison term enhancement must be eliminated because there is no longer a felony underlying the enhancement. Gardea cites to *People v. Park* (2013) 56 Cal.4th 782 (*Park*) which held, "when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction within the meaning of section 667(a)." (*Id.* at p. 799.)

Gardea's reliance on *Park* is misplaced. In *Park*, the trial court reduced the defendant's prior felony conviction to a misdemeanor and then dismissed the conviction. (*Park, supra*, 56 Cal.4th at p. 787.) The defendant's prior conviction was reduced to a misdemeanor under section 17, subdivision (b)(3), which provides, "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail ..., it is a misdemeanor for all purposes ... [¶] ... [¶] [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation ... declares the offense to be a misdemeanor." Our Supreme Court held the conviction no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a), and could not be used to enhance the defendant's sentence for crimes he subsequently committed. (*Park, supra*, at p. 787.) Critically, however, the trial court's reduction and dismissal of the prior felony conviction occurred before the defendant was sentenced for any new crimes.

Here, defendant's sentence had already been enhanced based on his prior offenses. The *Park* court considered this scenario and stated, "There is no dispute that ... defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park, supra*, at 56 Cal.4th p. 802.)

Section 1170.18, subdivision (k) provides the following, in pertinent part: "Any felony conviction that is ... designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes ...." The phrase "for all purposes" is identical to language in section 17, subdivision (b). " 'When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears. [Citation.]' " (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100, original brackets.) However, nothing in the plain language of section 1170.18 or the ballot materials reflects a contrary intent.



(*Rivera* at p. 1100.) Plainly stated, nothing indicates the voters intended a conviction reduced to a misdemeanor under the Act to be considered a misdemeanor “for all times.”

Based on the language of section 1170.18 and the voter’s intent in passing the initiative, we conclude Proposition 47 does not apply retroactively to alter sentence enhancements. As a result, we reject Gardea’s claim he is entitled to have his prior prison term enhancement stricken.<sup>2</sup>

### **DISPOSITION**

The judgment is affirmed.

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<sup>2</sup>We note the issue is currently pending review in the California Supreme Court. (See *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.)